No. 95-789

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

STATE OF CALIFORNIA, DIVISION OF LABOR STANDARDS ENFORCEMENT, DIVISION OF APPRENTICESHIP STANDARDS, DEPARTMENT OF INDUSTRIAL RELATIONS; COUNTY OF SONOMA,
Petitioners,
v.
DILLINGHAM CONSTRUCTION, N.A., INC.; MANUEL J. ARCEO dba SOUND SYSTEMS MEDIA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO IN SUPPORT OF PETITIONERS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO IN SUPPORT OF PETITIONERS

The Building and Construction Trades Department, AFL-CIO, representing more than four million laborers and mechanics employed in the construction industry throughout the United States, and fifteen national and international labor unions, many of whose members are employed in the construction industry, files this brief *amicus curiae* with the consent of the parties, as provided for in the Rules of this Court. The fifteen national and international labor union members of the BCTD and the local building and construction trades unions with which they are affiliated together with employers signatory to collective bargaining agreements with those unions, presently spend more than $300 million at the national and local levels to train approximately 170,000 apprentices a year at more than 1,000 training facilities.

INTRODUCTION AND SUMMARY OF ARGUMENT

Apprenticeship is the traditional means by which a young person acquires a skilled trade. Pursuant to an indenture, the apprentice pledges several years of faithful service and receives in return a pledge of sufficient on-the-job training and supplemental instruction to become a journeyperson under the accepted norms of the craft. *See generally* U.S. Department of Labor, Bureau of Apprenticeship and Training, *Apprenticeship: Past and Present* (1982).

To protect young people from exploitation and to promote apprenticeship, the federal government and a majority of states provide for registration of apprenticeship programs in accordance with a cooperative scheme set up by the National Apprenticeship Act of 1937 (the "Fitzgerald Act"), 29 U.S.C. § 50, and that Act's implementing regulations, 29 C.F.R. Part 29. Registration is voluntary but limited to programs in which certain

minimum labor standards are met. Those standards ensure that apprentices are not mistreated; that the ratio of journeypersons to apprentices on the job provides for adequate supervision and safety; and that the apprentice receives the training to become a recognized journeyperson competent to perform skilled work in a broad range of settings. *See* 29 C.F.R. §§ 29.5 & 29.6.

The federal and state laws setting minimum wage levels have, of necessity, required that special provision be made for apprentices. Thus, the federal Fair Labor Standards Act, Davis-Bacon Act, and Service Contract Act and their implementing regulations allow, under specified circumstances, for a subminimum wage to be paid to *bona fide* apprentices. *See* 29 C.F.R. § 4.6(p), § 5.5(a)(3)(ii)(B)(4)(i), & Part 521. California's prevailing wage law, which sets minimum wages on state public works projects, contains a similar provision for *bona fide* apprentices, as do virtually all state prevailing wage laws. *See* Petition for a Writ of Ceritorari (Pet.) at n. 2.

The Ninth Circuit held in this case—in direct conflict with the holding in *Minnesota Chapter ABC v. Minnesota*, 47 F.3d 975 (8th Cir. 1995)—that a state that provides a subminimum wage for apprentices, unlike the federal government, cannot *limit* the provision to *bona fide* apprentices, *i.e.* to apprentices in registered programs. According to the Ninth Circuit, such a limitation is preempted by the federal Employee Retirement Income Security Act (ERISA), as a state law that "relates to" an ERISA plan (ERISA § 514(a), 29 U.S.C. § 1144(a)) and is not saved from preemption by ERISA's Savings Clause, § 514(d), 29 U.S.C. § 1144(d). The Eighth Circuit, by contrast, concluded that preempting a similar Minnesota statute would impair the operation of the Fitzgerald Act and its implementing regulations, and that the Minnesota statute is therefore "saved" from preemption by ERISA § 514(d).

As of 1990, there were more than 280,000 young people indentured to registered apprenticeship programs

in the United States, mainly concentrated in the building trades, where apprenticeship, not vocational school, still is the primary means by which a skilled craft is acquired. General Accounting Office, *Apprenticeship Training: Administration, Use and Equal Opportunity* 2, 16 (1992). The Ninth Circuit's holding prohibits states from distinguishing these *bona fide* apprentices from workers who have been labeled "apprentice" by their employer as a subterfuge to qualify for a subminimum wage on public projects. The holding thus puts states in the Ninth Circuit to a Hobson's choice of abandoning either (i) the minimum labor standards set for *all* workers on state projects, or (ii) the special provision for apprentices. The latter course would have the effect of making impractical the use of apprentices on state projects and of decreasing already scarce training opportunities for young people.

Because of the large number of individuals affected by any ruling weakening apprenticeship training programs and the importance of apprenticeship as a means of training young people in the skilled crafts, we are in full agreement with the Petition that the direct conflict among the circuits regarding application of ERISA's Savings Clause presents an issue of national importance as to which this Court's review is necessary. We submit this *amicus* brief to develop two points apart from the Savings Clause conflict, as to why the present case merits this Court's review.[1] These points were addressed by the court below and are encompassed within the Question Presented and the Petition (*see* Petition at 22-23 & at 26 n. 13), but the Petition does not address them at length.

1. ERISA's coverage provision, § 3(1), extends the reach of that statute to a "plan, fund or program . . .

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[1] As California points out in the Petition, the question whether the ERISA Savings Clause saves from preemption state registration standards for apprenticeship programs that go *beyond* the minimum standards set forth by the Fitzgerald Act regulations is *not* at issue here. Petition at n. 14.

for the purpose of providing . . . apprenticeship or other training programs." The Ninth Circuit determined that the standards for training apprentices are part of an "apprenticeship . . . program" within the meaning of the coverage provision. The salient issue, however, given the language of the definitional provision in its entirety, actually is whether those standards are part of the "plan, fund or program" to *provide* an "apprenticeship . . . program." The language and structure of the coverage provision, when considered in light of the statutory objectives and the background against which ERISA was adopted, strongly suggest that only the *financial* aspects of defraying the costs of an apprenticeship program, not the *labor standards* pursuant to which the program itself is run, are within the ERISA definition of "employee welfare benefit plan." There is therefore a significant question, meriting this Court's review, as to whether California's prevailing wage law "relates to" an ERISA "welfare benefit plan" for purposes of ERISA's preemption provision.

2. There also is a significant issue for this Court as to whether the Ninth Circuit was correct in rejecting, as irrelevant to the preemptive scope of ERISA, the distinction between a state acting as regulator and a state acting as market participant. This distinction has been recognized by the Court in other contexts, based on the presumption that Congress ordinarily does not intend to override the states' traditional freedom to deal in the market on such terms, and with such persons, as the states may choose. Neither the language or objectives of ERISA suggest that Congress meant to reject the regulator/market participant distinction for purposes of preemption. The California procurement law at issue—which directly affects how a particular contract will be performed and furthers legitimate procurement interests—appears to resolve just the type of market participation question which Congress is ordinarily presumed to leave to the states.

ARGUMENT

1. *ERISA Coverage Issue*: This case presents a significant issue, meriting this Court's review, as to whether the lower courts have taken the wrong path in applying ERISA's coverage provision, § 3(1), 29 U.S.C. § 1002(1), in the context of apprenticeship programs. The Ninth Circuit's preemption holding rests on the conclusion that ERISA's definition of "employee welfare benefit plan" encompasses the substantive employment and training standards pursuant to which an apprenticeship program is run—the instruction apprentices will receive, the wages they will be paid, etc.—rather than merely the plan for defraying the *costs* of the apprenticeship program. According to the Ninth Circuit, the plain language of ERISA compels this conclusion. Pet. App. 10-11, citing *Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee*, 891 F.2d 719, 727-29 (9th Cir. 1989).

The Ninth Circuit, however, asked the wrong statutory question. Section 3(1) of ERISA, 29 U.S.C. § 1002(1), defines an "employee welfare benefit plan" within the coverage of the statute to include "any *plan, fund or program* . . . established or maintained by an employer or by an employee organization, or by both . . . for the purpose of providing for its participants or their beneficiaries" certain enumerated benefits or services (emphasis supplied). Included among the benefits and services listed in § 3(1)(A) are "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, *apprenticeship or other training programs*, or day care centers, scholarship funds, or prepaid legal services" (emphasis supplied).

The Ninth Circuit concluded that the training program at issue "was an 'apprenticeship or other training program' within the meaning of [§ 3(1)(A)]" (Pet. App. 10). The real coverage question, however, is not what constitutes an "apprenticeship or other training program"

but what Congress meant by a "plan, fund or program" to *provide* such a "program."

The structure of the coverage provision suggests that Congress meant to differentiate *between* the substantive "program" provided and the means for providing that program, not to conflate the two. At the least, the awkward, two-tier, linguistically repetitive structure of this provision precludes an obvious, plain meaning answer as to what Congress intended.

Consideration of the whole object and policy of the federal statute indicates that what Congress actually intended in the definition of "plan" in ERISA was to include as an ERISA "plan, fund or program" *only* the plan for supporting financially an apprenticeship program, *not* the set of *labor standards* followed by the "apprenticeship program" in training apprentices. Reading the ERISA coverage provision in light of the backdrop against which it was adopted confirms this narrower reading of that provision.

A state provision concerned solely with minimum labor standards for apprentices—like California's provisions for the voluntary registration of apprenticeship plans—therefore does not, without more, "relate to" an ERISA "plan" within the meaning of the ERISA preemption provision, even apart from whether the Savings Clause would apply to such state action.

a. At the outset, *Massachusetts v. Morash*, 490 U.S. 107 (1989), establishes that it is *not* enough to look to the words of the ERISA coverage provision in a vacuum in determining whether a matter is within the statutory coverage. The issue in *Morash* was whether "a company's policy of paying its discharged employees for their unused vacation time constitutes an 'employee welfare benefit plan' within the meaning of Section 3(1) of [ERISA]." 490 U.S. at 109.[2]

[2] Section 3(1) includes in the list of covered benefit programs, right before "apprenticeship or other training programs," "vacation benefits."

The *Morash* Court acknowledged that "[t]he words 'any plan, fund, or program . . . maintained for the purpose of providing . . . vacation benefits' may surely be read to encompass any form of regular vacation payments to an employee." 490 U.S. at 114. The Court declined to so read the coverage provision, however, because "[i]n enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employee benefits from accumulated funds." 490 U.S. at 115. Where the danger of mismanageemnt of accumulated funds is not present, the Court found it unlikely that Congress intended to subject employment-related programs to ERISA regulation. *Id.*[3]

The *Morash* Court recognized as well that "[t]he States have traditionally regulated the payment of wages" and related aspects of compensation, and including such compensation within the coverage of ERISA would displace state regulation in the area, with the result that "employees would actually receive less protection." 490 U.S. at 119. Where that would be the case, *Morash* concluded, courts should be "reluctant to so significantly interfere with the 'separate spheres of governmental authority preserved in our federalist system'." *Id., quoting Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19 (1987). Finally, the *Morash* Court noted that "the extension of ERISA to claims for vacation benefits would vastly expand the jurisdiction of the federal courts, providing a

[3] The *Morash* Court noted that, with respect to the types of benefits listed in § 3(1):

> The distinguishing feature of most of these benefits is that they accumulate over time and are payable only upon the occurrence of a contingency outside the control of the employee . . . The reference[s] . . . in Section 3(1) should be understood to include within the scope of ERISA those . . . benefit funds, analogous to other welfare benefits, in which either the employee's right to a benefit is contingent upon some future occurrence or the employee bears a risk different from his ordinary employment risk. [490 U.S. at 115-16.]

federal forum for any employee with a vacation grievance" (490 U.S. at 118-19), a result Congress would not likely have intended in an age of already overcrowded federal court dockets.

The same analysis leads to the conclusion that the *financial* aspects of defraying the costs of apprenticeship instruction or program administration are covered by ERISA, but the labor standards aspects of apprenticeship training—such as the wages to be paid apprentices from an employer's general assets, the hours, work conditions and job assignments applicable on the job, and the content of the training and education received—are not. These aspects of apprenticeship simply "present none of the risks that ERISA is intended to address." *Morash*, 490 U.S. at 115. They involve no contingency other than the "ordinary" contingencies of the employment relationship (*id.* at 116), and generate no concern with the mismanagement of accumulated funds.

Moreover, the basic state function of registering privately sponsored apprenticeship programs and ensuring their ongoing integrity, recognized by the Fitzgerald Act, had long been the traditional province of the states when Congress enacted ERISA in 1974. It is unlikely that Congress intended in ERISA to displace that state function, and thereby leave apprentices with "less protection" than before ERISA was adopted. Congress also would not likely have intended to provide apprentices with a federal forum for benefit or fiduciary breach claims each time their employer denied them, for example, entry to a training program or assignment to a job.

b. The same conclusion follows from the language and structure of the ERISA coverage provision taken against the background at the time Congress adopted ERISA. A summary of that background shows that by the time ERISA was passed Congress had drawn a clear distinction between articulation and enforcement of apprenticeship *labor* standards on the one hand, and apprenticeship program *financial* standards on the other.

(i) Federal involvement in promoting apprenticeship labor standards began in 1934, when Executive Order No. 6750-C created the Federal Committee on Apprenticeship to work with representatives of labor, management and the states to set voluntary apprenticeship labor standards. The purpose of the 1937 Congress in adopting the Fitzgerald Act, 29 U.S.C. § 50, was to provide statutory authorization for this work to continue. H.R. Rep. No. 945, 75th Cong., 1st Sess. 2-3 (1937). By the time of the Act's passage, some 45 states had set up aprenticeship committees. *See* Pet. App. 117. The Fitzgerald Act was entitled "An Act to enable the Department of Labor to formulate and promote the furtherance of *labor standards* necessary to safeguard the welfare of apprentices and to cooperate with the States in the promotion of such *standards*." 50 Stat. 664 (1937) (emphasis supplied). And, the Act, in turn, directs the Secretary of Labor to "formulate and promote the furtherance of *labor standards*" for apprenticeship and "to cooperate with the State agencies engaged in the formulation of and promotion of *standards of apprenticeship*." 29 U.S.C. § 50 (emphasis supplied).

Pursuant to the Fitzgerald Act, the Secretary of Labor has promulgated regulations setting forth criteria for defining apprenticeable occupations and minimum standards governing apprenticeship training. The regulations, codified at 29 C.F.R. §§ 29.1-29.13, encourage the development by employers and labor organizations of apprenticeship training programs, and establish a procedure by which programs meeting minimum federal standards may be approved by the Bureau of Apprenticeship Training as eligible for federal assistance and certification and for other federal purposes. The federal regulations also enlist the states in the promotion of apprenticeship training by providing for the approval by the Secretary of state apprenticeship councils ("SACs") in states that have adopted apprenticeship laws and regulations meeting the

federal minimum requirements. The regulations delegate to an approved SAC the responsibility for certifying local apprenticeship programs.

Neither the Fitzgerald Act nor its implementing regulations, however, say *anything* about how apprenticeship programs are *financed*. Nor do the Act and regulations address the manner in which such a financing scheme would be administered; what they do require as a condition of registration, is that the apprenticeship program be conducted pursuant to "an organized, written *plan* embodying the terms and conditions of *employment, trainiug, and supervision*." 29 C.F.R. § 29.5(a) (emphasis supplied).

(iii) Congress then addressed in 1959 the separate issue of the manner in which apprenticeship programs are *financed*. Because of the intermittent nature of employment in the construction industry, many fringe benefits are provided to union workers by jointly managed labor-management trust funds to which employers contribute. In 1959, Congress amended § 302(c) of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 186(c), to make clear the legality of using such trust funds to finance apprenticeship programs, so long as certain standards are followed with respect to fund administration. *See* Pub. L. 86-257, § 505, 73 Stat. 519, 537-38 (1959).

This amendment took the form of an exception to LMRA § 302's general ban on the payment by the employer of anything of value to the representative of its employees, for "money . . . paid by any employer for purposes of a trust fund established by such representative for the purpose of . . . *defraying the costs of apprenticeship or other training programs,*" so long as, *inter alia*, "the detailed basis on which such payments are to be made *is specified in a written agreement*" and there are "provisions for an annual audit of the trust fund. . . ." 29 U.S.C. § 186(c)(6). Thus, the administration of

labor-management apprenticeship trust funds was brought within federal control. The concern of § 302(c), however, was with financial goverance, not with the programmatic aspects directly affecting the apprentices, and the "written agreement" referred in § 302(c) concerns only the manner in which contributions are made to the fund financing the program. That "written agreement," in other words, is not the written "plan" referred to in the Fitzgerald Act regulations; the former covers *none* of the issues addressed by the latter.

Six years later, Congress amended the Davis-Bacon Act, which sets minimum wage rates for workers on most federal construction projects, to include certain fringe benefits within the definition of the "prevailing wage." *See* Pub. L. 88-349, 78 Stat. 238 (1964). Among those benefits are contributions "irrevocably made by a contractor or subcontractor to a trustee or to a third person *pursuant to a fund, plan, or program . . . for defraying costs of apprenticeship or other similar programs.*" 40 U.S.C. § 276a(b) (emphasis supplied). The term "fund, plan, or program" in the Davis-Bacon Act was derived from § 3(a) of the Welfare and Pension Plans Disclosure Act ("WPPDA") (Pub. L. 85-836, 72 Stat. 997 (1958)), the predecessor federal statute to ERISA with respect to the regulation of welfare and pension plans. *See* S. Rep. No. 963, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 2339, 2344 (explaining derivation).[4] And the Davis-Bacon provision makes clear that, in context, the "fund, plan or program" in question is one that concerns how the *costs* of an apprenticeship "program" are defrayed (such as the "agreement" referenced in LMRA § 302(c)), not with the Fitzgerald Act "plan" containing the labor standards under which the apprenticeship program is run.

c. Having summarized the pertinent background, we return to the language of ERISA's coverage provision.

[4] The WPPDA did not itself cover any aspect of apprenticeship.

Congress' adoption of the awkward two-tier structure referring to a "plan, fund or program" for providing apprenticeship "*programs,*" rather than simply to a "plan, fund or program" to provide *apprenticeship*, strongly suggests that the "plan" covered by ERISA is the plan for defraying the costs of apprenticeship that is the subject of LMRA § 302(c) and the Davis-Bacon Act amendments, not the Fitzgerald Act "plan" containing an apprenticeship program's labor standards.[5]

Congress' unusual syntax obviously reflects a considered choice of words, as *none* of the other listed schemes is described as a "program." Moreover, the same, out-of-the-ordinary, syntax is employed in the Davis-Bacon amendments, which refer to a "fund, plan or *program* . . . for defraying costs of apprenticeship or other similar *programs*" (emphasis supplied). In that context, it is clear, as discussed above, that the "fund, plan or program" encompasses financial concerns, while the second reference to "programs" entails the substantive labor standards issues concerning apprentices.

ERISA § 3(1)(B) further provides that a plan providing "any benefit described in" LMRA § 302(c), 29 U.S.C. § 186(c), is covered by ERISA. And, LMRA § 302(c)(6), in turn, includes "a trust fund . . . established . . . for the purpose of defraying costs of apprenticeship or other training programs." Again the reference is to a plan for financing an apprenticeship program, not the plan for running the program.[6]

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[5] Congress could not, without drastically changing the structural parallelism of the ERISA coverage provision, have referred to a plan to "defray the costs of apprenticeship," as it did in the 1959 amendments to LMRA § 302 and the Davis Bacon Act amendments. A "plan" for purposes of ERISA § 3(1) is one that "provid[es] for its participants or their beneficiaries" one of the listed schemes. "Defray the costs of apprenticeship" is not a noun, and would not grammatically fit in the list.

[6] The use of the same phrase, "apprenticeship or other training programs," in ERISA § 3(1)(A) and in LMRA § 302(c) suggests that Congress intended to encompass the plans to *defray the costs* of apprenticeship that are included in § 302(c), but not to limit coverage to the union context or to plans that include formal trust funds. *See Massachusetts v. Morash*, 490 U.S. 107, 114 n. 9 (1989).

d. The conclusion that the ERISA coverage provision encompasses only the plan for defraying the *costs* of apprenticeship also is suggested by the Secretary of Labor's regulations interpreting the ERISA coverage provision as not encompassing employer "plans" or "programs" that provide compensation to employees undergoing on-the-job training. *See* 29 C.F.R. § 2510.3(1)(b)(3)(iv) (excluding "[p]ayment of compensation on account of periods of time during which an employee performs little or no productive work while engaged in training"). As the Secretary explained in proposing that exclusion, "[a]lthough section 3(1) of [ERISA] can be read to include job-skill training within the term 'welfare plan,' such training is virtually inseparable from an employee's normal duties for which compensation is paid, and therefore is not treated as an employee benefit plan." 40 Fed. Reg. 24,643 (1975). And, that regulatory exclusion is but one part of a broader exclusion from ERISA for a variety of "payroll practices" (of which the *Morash* Court dealt with one), which amount to nothing more than the payment of ordinary compensation out of an employer's general assets. *See* 29 C.F.R. § 2510.3-1(b).

That is precisely what is at issue here: the payroll practice of paying wages to apprentices. And, these wages are paid from an employer's general assets, like the wages of every other employee, not from a fund set up to defray the costs of the apprenticeship program, which is used to pay for instructors and for program administration.[7]

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[7] The only alternative reading of the Secretary's training regulations would be that as the existence of an ERISA "plan" turns simply on whether or not a separate fund has been created to finance the apprenticeship program. Otherwise identical apprentice-

e. In sum, the substantive program of apprentice training and employment, embodied in a Fitzgerald Act plan —in contrast to the separate "plan, fund or program" established to *finance* the instruction and administration involved in apprenticeship programs—implicates no area of ERISA regulation, does not resemble other benefit "plans" covered by ERISA, and involves an area traditionally regulated by the states. Congress therefore would not have intended ERISA's coverage provision to encompass a "plan" simply covering the labor standard aspects of apprenticeship within the definition of an "employee welfare benefit plan."

It remains, then, to apply this analysis to the statutory provisions governing whether the California law at issue

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ship "plans" as that term is used in the Fitzgerald Act would be covered by ERISA, or not, depending *not* on any aspect of the training or employment condition provisions but upon upon the quite separate question of whether the financing for the "plan" comes from an employer's general assets or from a separate fund.

Such an interpretation of ERISA produces absurd results. Moreover, only by applying a distinction between the financial and the programmatic aspects of other types of employee welfare benefit plans covered by ERISA does one obtain sensible results. The definition of "employee welfare benefit plan," for example includes a "plan, fund, or program . . . established . . . for the purpose of providing . . . medical, surgical or hospital *care* or benefits . . . or day care *centers* . . . , or prepaid legal *services*." 29 U.S.C. § 1002(1)(A) (emphasis supplied). Yet, it is unlikely that Congress intended that ERISA cover (and therefore preempt state law addressing) the sustantive standards concerning the provision of medical care, or day care centers, or legal services, however that care or those centers or services are funded. Congress surely did not intend ERISA to regulate, for example—and we would not expect ERISA § 514(a) to preempt—state laws concerning the ratio of adults to children, or space requirements, or any other aspects of the manner in which children are cared for in day care centers. Nor is it likely that state laws covering the standard of care required of medical or legal professionals, or the licensing of day care personnel or nurses, are preempted by ERISA or not, depending upon the financial arrangements made to provide the care, centers, or services.

is preempted. Section 514(a) of ERISA provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a)." 29 U.S.C. § 1144(a). A state prevailing wage law that provides for the wages to be paid apprentices can only be said to "relate to" the minimum labor standards of apprenticeship programs, which, in turn, can only be said to "relate to" the plan by which the apprenticeship program is financed.

The Court recognized in *New York State Conference of Blue Cross v. Travelers Insurance Co.*, 115 S.Ct. 1671 (1995), however, that "[i]f 'relate to' were taken to extend to the furthest stretch of its indeterminency, then for all practical purposes preemption would never run its course." *Id.* at 1677. The question whether a state law "relates to" an ERISA plan must therefore be answered by considering "the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id.* And, when the ERISA coverage provision is properly read as including only the financial aspects of apprenticeship, it is clear that state involvement with apprenticeship *labor standards* is not the state action Congress sought to preempt.

At the least, there is a substantial question, meriting this Court's review, as to whether, by interpreting the ERISA coverage provision too broadly, the Court of Appeal has extended ERISA's already considerable preemptive shadow into an area of traditional state concern with which Congress never intended to interfere.

2. *Market Participant Issue:* This case also presents the Court with the opportunity to consider, in the context of ERISA preemption, the distinction between the state acting as regulator and the state acting as market participant. *All* the ERISA preemption cases decided to date by this Court concern state regulatory enactments restricting what private parties lawfully may do in their dealings with other parties both private and public. The Ninth

Circuit's decision, by contrast, extends the preemptive reach of ERISA to a state rule applicable *only* to transactions in which the state is purchasing services in the marketplace; *viz.* to a rule that private parties may ignore unless those parties voluntarily contract with the state.

Recognizing the importance of safeguarding the states' freedom to contract on such terms as they please, the Court has drawn a distinction, for purposes of determining whether the Commerce Clause restricts a state's freedom to act, between the state acting as regulator and the state acting as market participant. In the latter circumstance, there is no Commerce Clause restraint on the states. *See White v. Massachusetts Council of Construction Employers*, 460 U.S. 204 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *Hughes v. Alexandria Scrap Corporation*, 426 U.S. 794 (1976). The Court has drawn a similar regulator/market participant distinction in determining whether state action is preempted by the National Labor Relations Act. *Compare Wisconsin Department of Industry v. Gould, Inc.*, 475 U.S. 282 (1986) *with Building & Construction Trades Council v. Associated Builders & Contractors*, 113 S.Ct. 1190 (1993).

The Ninth Circuit rejected the argument that ERISA does not preempt California's prevailing wage law because Congress did not intend in enacting ERISA to displace state authority to set the terms on which the state would contract. Pet. App. 18-21. The Court of Appeals offered two reasons for this conclusion, neither of which is convincing.

First, the court below suggested that the regulation/market participant distinction, though recognized in NLRA preemption cases, has *no* relevance at all to ERISA preemption:

> The NLRA contains no preemption clause. . . . [A] state's actions are only subject to preemption under the NLRA if it is *regulating* in a protected zone. ERISA, on the other hand, contains a broad preemption clause under which any state law which "relates to" an employee benefit plan is preempted. [App. 21 (citations omitted, emphasis in original).]

The question of federal preemption under ERISA, as under all other federal statutes, however, turns on Congress' intent, *see Travelers, supra*, 115 S.Ct. at 1677, and "the starting presumption [is] that Congress does not intend to supplant state law," particularly with respect to areas "historically a matter of local concern." *Id.* at 1676, 1680. The "basic thrust of the [ERISA] preemption clause . . . was to avoid a multiplicity of *regulation* in order to permit the nationally uniform administration of employee benefit plans." *Id.* (emphasis supplied). It therefore is not immediately clear why, when Congress' concern was, as is the usual case, with state *regulation*, ERISA should be interpreted uniquely as preempting state market participation.

Certainly nothing in the text of ERISA shows that Congress intended to reject the distinction between state regulation and state market participation recognized in other contexts. The textual indications are to the contrary: Section 514(c)(2) of ERISA, 29 U.S.C. § 1144 (c)(2), defines the term "State" for purposes of the ERISA preemption provision as including "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to *regulate*, directly or indirectly, the terms and conditions of employee benefit plans." (Emphasis supplied). The use of the term "regulate" in § 514(c)(2) provides an indication that preemption of state *regulation* is indeed what Congress had in mind in the ERISA preemption provision, not displacement of state authority to decide with whom the state will do business, and on what terms.[8]

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[8] We are not arguing that § 514(c)(2) provides a *limitation* on the state laws that otherwise would be preempted. *Cf. Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 141-42 (1990). The reference to state "regulation," however, does provide an indication that what Congress had in mind in adopting ERISA's preemption provision

Second, the Ninth Circuit also concluded that in this case "the state was not acting as a market participant . . . . [because] [t]he state's application of its prevailing wage law has the 'effect and possibly the aim' of encouraging participation in a state-approved ERISA plan. . . ." Pet. App. 21 (citation omitted). But virtually every state action in the marketplace encourages or discourages private conduct. The procurement rule may well affect the mix of incentives that determine whether a particular employer chooses to set up a particular type of ERISA plan. That type of indirect economic effect on the choices of private parties, as the Court recognized in *Travelers, supra*, is *not* what the *ERISA* preemption provision is intended to reach. *See* 115 S.Ct. at 1679 ("An indirect economic influence, however, does not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself.")

The case relied upon by the Ninth Circuit as an analogy, moreover, *Wisconsin Department of Industrial Relations v. Gould, supra*, involved a set of facts that are dramatically different from those here in several pertinent respects. In *Gould*, the Court held that the NLRA preempted a Wisconsin statute barring repeat violators of the NLRA from doing business with the state. The Court found that, while in form a procurement statute, the Wisconsin law was addressed to employer conduct unrelated to the employer's performance of any contractual obligations to the state and unrelated to the specific objects of any state purchasing decision. The Court therefore concluded that the statute cannot "even plausibly be defended as a legitimate response to state procurement restraints or to local economic needs." 475 U.S. at 291.[9]

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is *not* different in kind from what Congress ordinarily has in mind when preempting state law.

[9] *See*, applying a similar distinction between state regulation and state market participation in a Commerce Clause context, *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 99 (1984); *compare White v. Massachusetts Council of Construction*

By contrast, the California procurement rule at issue relates directly to how the *particular* contract being let is carried out, and responds to the state's interest in having *that contract* carried out properly. The restriction of the apprentice wage to *bona fide* apprentices—*i.e.* those in registered programs—ensures that apprentices on state projects are receiving adequate supervision and that safety rules are being followed. It also ensures that the "apprentice" wage is not used as a subterfuge for undercutting labor standards for journeyperson, which are intended, in part, to assure quality workmanship and qualified workers on state projects. Finally, and not insignificantly, the restriction makes it possible for responsible contractors (who do not exploit their apprentices) to bid competitively on state projects.

The state rule invalidated below may provide some incentive to employ *bona fide* apprentices, but as stated, the Court recognized in *Travelers* that Congress did not intend ERISA to preempt every state action that may vary the economic incentives to employers or plan administrators in the benefits arena. Moreover, in light of the federal policy—embodied in the Fitzgerald Act—of cooperating with state efforts to formulate labor standards to protect apprentices, Congress would not have been concerned that the California rule might have the effect of encouraging participation in *registered* apprenticeship programs, rather than those in which minimum labor standards are not respected.[10]

Employers, supra, in which the Court upheld, against a Commerce Clause challenge, a city procurement rule setting residency requirements for employees of contractors on public works projects, noting that the employees are "in a substantial if informal sense, 'working for the city' " 460 U.S. at 211 n.7.

[10] Nothing in California's procurement rule requires that private contracting parties *violate* any ERISA-imposed requirement in order to do business with the state. If that were the case, the pertinent preemption considerations obviously would be very different.

There is therefore, at the least, a substantial question, worthy of this Court's consideration, as to whether the Ninth Circuit has erroneously curtailed California's traditional freedom to act in the marketplace, doing business with such parties and upon such terms as the state may choose.

CONCLUSION

For the foregoing reasons as well as those discussed in the Petition for a Writ of Certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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